No. 84-805

In The
Supreme Court of the United States
October Term, 1984

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, Debtor,
Petitioner,

v.

THE CITY OF NEW YORK and STATE OF NEW YORK,
Respondents.

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, Debtor,
Petitioner,

v.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below was correct that Congress did not intend the Bankruptcy Code, 11 *U.S.C.* § 554 (a), which authorizes the abandonment of burdensome property, to abrogate federal, state and local laws governing the disposal of hazardous wastes.

2. Whether a trustee can abandon a hazardous waste facility in contravention of state laws and his obligations under 28 *U.S.C.* § 959(b) to manage and operate the property according to the requirements of valid state laws.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT:	
A. THE DECISION OF THE COURT OF APPEALS IS NOT CONTRARY TO ANY OF THIS COURT'S PRIOR RULINGS.	5
B. THE QUESTION OF THE CORRECTNESS OF THE COURT OF APPEAL'S INTERPRETATION OF 11 *U.S.C.* § 959(b) NEED NOT BE REACHED BY THIS COURT.	8
C. THIS COURT NEED NOT DECIDE WHETHER ABANDONMENT IN THIS CASE VIOLATES STATE LAWS OR REGULATIONS.	9
D. THE DECISION OF THE COURT OF APPEALS WILL NOT FRUSTRATE THE OBJECTIVES OF THE BANKRUPTCY CODE.	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:

	Page
Gillis v. California, 293 U.S. 62 (1934)	9
In the Matter of Canarico Quarries, Inc., 466 *F. Supp.* 1333 (D.P.R. 1979)	9
In re Chicago Rapid Transit Company, 129 *F.*2d 1 (7th Cir.), *cert.* den., 317 U.S. 683 (1942)	9

TABLE OF AUTHORITIES—Continued

	Page
In re Dolly Madison Industries, 504 *F.*2d 499 (3rd Cir. 1974)	9
N.L.R.B. v. Bildisco & Bildisco, — *U.S.* —, 104 *S.Ct.* 1188, 79 *L.Ed.*2d 482 (1984)	5, 6
Ohio v. Kovacs, (No. 83-1020, January 9, 1985)	8, 9
United States v. Security Industrial Bank, 459 *U.S.* 70, 103 *S.Ct.* 407, 74 *L.Ed.*2d 235 (1982)	5, 6, 7

STATUTES:

11 *U.S.C.* §362(d)	7
11 *U.S.C.* §365(a)	5
11 *U.S.C.* §503	11
11 *U.S.C.* §503(b)	10
11 *U.S.C.* §507	11
11 *U.S.C.* §507(a)	10
11 *U.S.C.* §552(f)	7
11 *U.S.C.* §554	passim
11 *U.S.C.* §701 *et seq.*	3
11 *U.S.C.* §959(b)	8
11 *U.S.C.* §1167	5
11 *U.S.C.* §15107	12
28 *U.S.C.* §959(b)	8, 9, 12
28 *U.S.C.* §1293(b)	3

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COUNTERSTATEMENT OF THE CASE

These companion cases result from appeals by the New Jersey Department of Environmental Protection (hereafter "NJDEP") and the City and State of New York from orders of the United States Bankruptcy Court for the District of New Jersey allowing the trustee in bankruptcy of Quanta Resources Corporation to abandon waste oil reprocessing facilities in Edgewater, New Jersey, and New York City. The Bankruptcy Court relied on 11

U.S.C. § 554, which governs abandonment of property of the bankrupt's estate.

Quanta Resources Corporation is a Delaware corporation which was formed in March, 1980 to engage in the business of waste oil recovery at several sites in New York and in Edgewater, New Jersey. It owned the land in New York City which was used to reprocess oil, and leased the land in New Jersey from James V. Frola and Albert VonDohlin.

With regard to the New Jersey facility, Quanta had taken it over in July, 1980. It had been used by a previous company which had been granted a temporary operating authorization from the NJDEP, which specifically prohibited acceptance of polychlorinated biphenyls (PCB's), an extremely hazardous substance, at the facility. When Quanta took over the facility a similar restriction was placed in its temporary operating authorization. Quanta accepted waste oil and other liquids at the property and put it in its tanks, where it was reprocessed and sold.

A sampling of waste at the site by NJDEP in June, 1981, revealed that PCB's were present in the liquids in the tanks in excess of the permissible standards in the temporary operating authorization. On July 2, 1981, Quanta agreed, at NJDEP's request, to cease operations at the site. Following the shutdown, NJDEP and Quanta began negotiations regarding the cleanup of the property, but on October 6, 1981, Quanta filed for reorganization under Chapter 11 of the Bankruptcy code. On October 7, 1981, NJDEP issued an Administrative Order to Quanta requiring that it cease operations and clean up all hazardous materials at the site. On November 12, 1981, without

the work having been performed as ordered, Quanta filed for conversion of the proceeding in the Bankruptcy Court to a liquidation under 11 *U.S.C.* § 701 *et seq.*

The New Jersey facility, at the time of bankruptcy filing, included tanks holding approximately 3.5 to 5 million gallons of oil, oil sludge, and other liquids. About 400,000 gallons of this oil and sludge contained PCB's in excess of the permissible standard. Approximately 650,000 gallons of the oil that was on the site was able to be sold, and was sold after the bankruptcy filing. The proceeds from the sale were placed in an escrow account. To date, the other liquids remain on the site.

On May 20, 1983, an order was entered by the Bankruptcy Court authorizing the abandonment of the New Jersey property, effective May 17, 1983 *nunc pro tunc* (Pet. App. 64a to 65a).

On September 21, 1983, NJDEP filed a Notice of Appeal by Agreement to the Court of Appeals under 28 *U.S.C.* § 1293(b).

With regard to the New York property, it is located in the geographical heart of New York City, in Queens, and contained approximately 500,000 gallons of waste oil, sludge and hazardous waste on the property, more than 70,000 gallons of which were contaminated with PCB's. The facility was in a state of extreme disrepair.

The facility was operating in New York pursuant to a consent order with the New York State Department of Environmental Conservation (hereafter "NYSDEC"), which obligated Quanta to bring the facility into compliance with New York law. It has been the position of New York throughout these proceedings that the condition of

the facility violated not only the consent order but numerous provisions of the New York State Environmental Conservation Law.

It has been conceded by all parties that the cost of cleanup of the facility exceeded the value of any assets of the property, and in fact, after the bankruptcy was filed the City and State undertook a cleanup which cost approximately $2.5 million.

Following the proper notice, on June 22, 1982, the Bankruptcy Court authorized the Trustee to abandon the property (Pet. App. 69a to 75a). An appropriate order was entered on July 7, 1982, effective June 22, 1982 *nunc pro tunc* (Pet. App. 66a to 68a).

Notice of Appeal to the District Court was filed on July 16, 1982. In an oral opinion on January 24, 1983, and in a subsequent memorandum opinion (Pet. App. 52a to 60a), the District Court affirmed the decision of the Bankruptcy Court. A subsequent appeal was taken to the United States Court of Appeals for the Third Circuit.

Opinions in both the New Jersey and New York cases were filed on July 20, 1984, reversing the decisions of the Bankruptcy and District Courts. (Pet. App. 1a to 48a). The Trustee filed a petition for rehearing in both matters, and on August 16, 1984, rehearing was denied (Pet. App. 49a to 51a).

ARGUMENT

A. The Decision Of The Court Of Appeals Is Not Contrary To Any Of This Court's Prior Rulings.

Petitioner contends that the decision of the Court of Appeals is in conflict with this Court's decision in *NLRB v. Bildisco & Bildisco*, — *U.S.* —, 104 *S.Ct.* 1188, 79 *L.Ed.* 2d 482 (1984) and *United States v. Security Industrial Bank*, 459 *U.S.* 70, 103 *S.Ct.* 407, 74 *L.Ed.*2d 235 (1982), and therefore this Court should grant the writ of *certiorari* in this case. Respondent, NJDEP, submits that the decision of the Court of Appeals is consistent with both of those opinions, and therefore, *certiorari* should not be granted.

In *Bildisco* this Court was called upon to decide whether the term "executory contract" as used in 11 *U.S.C.* § 365(a) included collective bargaining agreements. A labor union had contended that § 365(a), which permits a trustee to assume or reject any executory contract of a debtor, did not extend to the right to reject a collective bargaining agreement.

In interpreting the meaning of § 365(a), this Court noted that that section contained a number of limitations on the right of a debtor to reject executory contracts, but that there was no limitation regarding the rejection of a collective bargaining agreement. *Bildisco*, 104 *S.Ct.* at 1194. This Court also noted that 11 *U.S.C.* § 1167 expressly exempted collective bargaining agreements under the Railway Labor Act from the provisions of § 365(a), and thus this Court felt that Congress did not intend to exempt collective bargaining agreements made under the

National Labor Relations Act. This Court reasoned that Congress had made a number of exceptions to the right to reject executory contracts, and since collective bargaining agreements was not among them Congress must have intended that they be allowed to be rejected.

Petitioner contends that this reasoning should be used to find that Congress intended, in enacting 11 *U.S.C.* § 554, to allow no exceptions to abandonment, despite the fact that such abandonment may constitute an illegal act according to State law.

There is no inconsistency between the *Bildisco* decision and the decision of the Court of Appeals in this matter. The Court of Appeals held that, with regard to § 554, Congressional intent regarding exceptions cannot be ascertained from a reading of the statute. The entire Bankruptcy Code and other statutes had to also be examined. The Court concluded Congress did not intend an unlimited right to abandon.

This is consistent with *Bildisco*. If § 554 had limited the power to abandon in some instances but not others, the petitioner's argument might be valid. However, it did not. The two decisions are thus not in conflict and provide no reason for this court to grant the writ of *certiorari*.

This Court's decision in *United States v. Security Industrial Bank*, 459 *U.S.* 70, 103 *S.Ct.* 407, 74 *L.Ed.*2d 235 (1982), is also not in conflict with the decision of the Court of Appeals. *Security Industrial Bank* simply stated the well-known principle of construction that constitutional questions should not be addressed if there is another way to interpret a statute to avoid the need to reach those questions. In *Security Industrial Bank* the court

was faced with the question of whether 11 *U.S.C.* § 552(f) should be applied retroactively. This Court held that, since there was no intent on the part of Congress to apply that section retroactively, there was clearly no constitutional taking question that need be decided if retroactivity were found to apply.

Here, however, there is no legislative history or other clear evidence of Congressional intent regarding § 554 of the Bankruptcy Code. Petitioner has raised the taking question, and thus has raised an issue which respondent contends need not be reached for the following reason.

It is not clear from the record whether the inability of the trustee to abandon the property will deplete the assets of the estate or the assets of any creditor. As the Court of Appeals noted, "the trustee argues that use of the estate's assets to comply with State law *may* deplete the estate . . ." (emphasis added). Failure to abandon has no effect on any particular creditor, since secured creditors still have the right to seek relief from the automatic stay and foreclose on their collateral, 11 *U.S.C.* § 362(d), and all other creditors will be in the same position they always were before any attempt to abandon. The court below did not even reach the question of what priority any government expenditures would have in the distribution of the estate. It specifically remanded that question to the Bankruptcy Court (Pet. App. 25a).

Therefore, contrary to petitioner's assertion, this Court would be applying the principle of *Security Industrial Bank*, to avoid unneeded constitutional questions, by not taking this case and allowing the remand to proceed in the Bankruptcy Court.

This Court's recent opinion in *Ohio v. Kovacs,* (No. 83-1020, January 9, 1985) is also not in conflict with the decision of the Third Circuit. *Kovacs* concerned itself with whether a debtor's obligation under a State injunction was dischargable because it was a "debt" or "liability on a claim." This Court held that it was. Respondent NJDEP is not seeking an injunction here, and there is no dispute in this case regarding whether NJDEP has a claim.

This Court also specifically noted that it was not deciding what the duties are of a trustee in bankruptcy, other than that the trustee must comply with state environmental laws while in possession of the site. *Kovacs,* Slip Opinion at 10-11. It was noted that were Kovacs' property in the possession of a trustee in bankruptcy, and were it worth less than the cost of cleanup, the trustee would likely abandon the property. *Kovacs,* Slip Opinion at 10, n. 12. However, this Court did not state whether such conduct by a trustee, if it were in violation of state law, would be permissible under the Bankruptcy Code, and thus the *Kovacs* opinion is not in conflict with that of the Third Circuit.

B. The Question Of The Correctness Of The Court Of Appeal's Interpretation of 11 U.S.C. § 959(b) Need Not Be Reached By This Court.

The Court of Appeals correctly construed 28 *U.S.C.* § 959(b), and its construction is consistent with the prior decisions of other federal courts on this issue. Respondent knows of no other Court of Appeals decisions which conflict with the interpretation of § 959(b) by the Third Circuit, since respondent knows of no other decisions interpreting this section in the context of liquidation. However,

the interpretation is consistent with other opinions in the context of reorganization. *See e.g., Gillis v. California,* 293 *U.S.* 62 (1934); *In the Matter of Canarico Quarries, Inc.,* 466 *F.Supp.* 1333 (D.P.R. 1979); *In re Dolly Madison Industries,* 504 *F.*2d 499 (3rd Cir. 1974); *In re Chicago Rapid Transit Company,* 129 *F.*2d 1 (7th Cir.), *cert.* den., 317 *U.S.* 683 (1942).

This Court also recently noted in *Ohio v. Kovacs* (83-1020, January 9, 1985), that any person in possession of a site that is part of a bankrupt estate, whether it is a receiver or a trustee in bankruptcy, must comply with environmental laws. Slip Opinion at 10-11. This is consistent with the holding of the Third Circuit below.

However, this Court need not reach the question of the interpretation of 28 *U.S.C.* § 959(b), because the Court of Appeals only discussed the section as an example of why it felt that Congressional intent, as embodied in § 554 of the Bankruptcy Code, prohibited abandonment of property when such abandonment would contravene state and local health laws. As an indication that Congress did not intend the abandonment power to be absolute, the court noted that 28 *U.S.C.* § 959(b) requires a trustee in bankruptcy to comply with state law.

C. This Court Need Not Decide Whether Abandonment In This Case Violates State Laws Or Regulations.

Petitioner asserts that the court below erred in deciding that abandonment would contravene New Jersey and New York laws, and therefore this Court should accept this case to reverse that holding. However, such a decision by the court below is not: a) in conflict with deci-

sions of other Circuits of Court of Appeals; b) an important question of federal law; or c) in conflict with any prior decisions of this Court.

Rather, all of the lower courts in this matter based their decisions on the assumption that abandonment would, in and of itself, violate the requirements of New York and New Jersey law (Pet. App. 6a, 54a, 72a). Each of the 50 states has different laws with regard to environmental protection. Therefore, for this Court to decide that the lower courts were incorrect in their assertions regarding the meaning of New York and New Jersey laws would not help the federal courts in the other 48 states when faced with the issue of the interpretation of § 554 of the Bankruptcy Code. The petition for writ of *certiorari* should therefore be denied.

D. The Decision Of The Court Of Appeals Will Not Frustrate The Objectives Of The Bankruptcy Code.

Petitioner asserts that the purposes of the Bankruptcy Code would be frustrated by the application of the decision of the court below. (See Petitioner's Brief at p. 18 to 27). Petitioner's assertion is based on his belief that the opinion of the court below assigned a priority to the claims of New York and New Jersey. On the contrary, however, the court below specifically declined to set such a priority.

New York had asked that its cost of cleanup be reimbursed out of the estate as an "administrative expense" as defined in 11 *U.S.C.* § 503(b) and § 507(a). The court held that,

> we need not, however, reach the issue of the priority, if any, of New York's claim. That is an issue that can properly be resolved only by the Bankruptcy Court, since the issue was not treated in the proceedings below and so the record on appeal does not include findings of relevant facts. (Pet. App. at 25a).

All that the court below held was that a trustee may not abandon property when such abandonment contravenes State and local public health laws. Thus, a trustee must retain possession of the property until the liquidation of the estate is complete. In some instances, a trustee may be required to expend assets of the estate during that time to prevent violation of State laws, including environmental protection and health laws. He also may not. States may or may not choose to expend their own funds during that time to correct violations of environmental and health laws. If they do, they may decide to file claims against the estate. The trustee then, with court approval, would be required to deal with these claims as with any other claims, according to the requirements of the Bankruptcy Code. *See* 11 *U.S.C.* §§ 503 and 507. New York and New Jersey have not asserted otherwise in this proceeding.

Respondent thus fails to see how the request that a trustee not abandon property in any way frustrates the purposes of the Bankruptcy Code, which petitioner has defined as the swift reduction of the debtor's property to money and the fair and equitable distribution to the debtor and its creditors of the estate. The court below has not created a preference for New York or New Jersey. It simply directed that the Bankruptcy Court consider what priority New York's claim might have, along with the claims of all other creditors.

With regard to the New Jersey facility, the court specifically noted that "NJDEP . . . has not argued it should be reimbursed for any expenses incurred in cleaning up or restoring the property . . .," and thus did not address that issue (Pet. App. 39a). The court reiterated:

> the issue is not who should pay to clean up the estate's property; it is whether the trustee's interest in preserving the estate should prevail over the public's interest in containing the hazards produced by toxic wastes in the possession of the estate. As in the companion case where the State and City of New York are appealing, we are convinced that the equities must be balanced in favor of the public interest. *Id.*

The petitioner finally asserts that the purposes of the Bankruptcy Code would be frustrated should the decision below stand, because no one would agree to be a trustee in bankruptcy. Again, petitioner misconstrues the opinion of the court below. That decision simply requires that the trustee in bankruptcy follow state and local laws to the extent that the funds in the estate allow. Trustees in bankruptcy are required frequently to balance competing requests for funds while the estate is being liquidated. This decision requires nothing different. In addition, even if a private trustee does not wish to serve, the United States trustee could be required to do so under 11 *U.S.C.* § 15107.

Petitioner also suggests that for some reason trustees would be subject to civil or criminal sanctions because of failure to clean up hazardous wastes that might exist at a site. Such sanctions under 28 *U.S.C.* § 959(b) would only be applied, however, if the trustee, while in possession of the assets of the estate, violates a state or local health or environmental law. This is no different than if the trustee

were to violate any other law while he is in possession of the estate.

In summary, nothing in the decision below conflicts with any of the purposes of the Bankruptcy Code.

CONCLUSION

There is no reason why the writ of *certiorari* should be granted in this case. The decision of the Court of Appeals does not conflict with any decisions of other courts of appeals. The decision also does not conflict with any prior decisions of this Court, and the questions presented by the petitioner are not so novel or important questions of interpretation of federal law that they require the granting of this writ.

It is therefore respectfully submitted that this petition for writ of *certiorari* to the United States Court of Appeals for the Third Circuit be denied.

DATED: Trenton, New Jersey
January 16, 1985

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